

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SUSAN R. MAGBY)	
Claimant)	
VS.)	Docket Nos. 183,397
WESTERN TEMPORARY SERVICES, INC)	183,398
LAWYERS TITLE INSURANCE CORP.)	183,983
TWENTY FIRST PUMP SERVICE)	
Respondent)	
AND)	
TRAVELERS INSURANCE COMPANY)	
HOME INSURANCE COMPANY)	
UNITED STATES FIDELITY & GUARANTY CO.)	
Insurance Carrier)	
AND)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Both claimant and respondent, Twenty First Pump Service, have filed an Application for Review of a Preliminary Order dated September 8, 1994. The Preliminary Order, entered by Administrative Law Judge Shannon S. Krysl, awarded preliminary benefits with fifty percent (50%) of the benefits to be paid by Twenty First Pump and twenty-five percent (25%) to be paid by Lawyers Title Insurance Corporation. The Order left twenty-five percent (25%) unaccounted for.

APPEARANCES

Claimant appeared by her attorney, Joseph Bribiesca of Wichita, Kansas. Western Temporary, Inc. appeared by its attorney, Lyndon Vix of Wichita, Kansas. Lawyers Title Insurance Corporation appeared by its attorney, Edward Heath, Jr., of Wichita, Kansas. Twenty First Pump appeared by its attorney, Kim R. Martens of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Cinda Norberg of Hutchinson, Kansas.

ISSUES

The issues in this appeal emerge from an unusual procedural context. Claimant filed three separate claims. She alleged repetitive trauma injuries arising from her employment, beginning at Twenty First Pump, during the period of March 30, 1992 through October 15, 1992 and then continuing from her work activities at Lawyers Title Insurance beginning in late October of 1992. Claimant initially worked at Lawyers Title as an employee of Western Temporary placed as a temporary employee of Lawyers Title. She became a permanent employee of Lawyers Title in January of 1993. Claimant first filed claims against Lawyers Title and separately against Western Temporary Services. A third claim was filed against Twenty First Pump. The claims against Lawyers Title and Western Temporary were combined for benefit review conference on October 29, 1993. At that conference the benefit review officer apportioned liability equally between the carriers for those two respondents. A separate benefit review conference was held on the claim against Twenty First Pump. Claims against all three were combined for an initial Preliminary Hearing held in January of 1994 as well as the September 1994 hearing which is the subject of this appeal.

From the first Preliminary Hearing in January 1994, the Administrative Law Judge found the claim compensable and portioned the liability with fifty percent (50%) to be paid by Lawyers Title, twenty-five percent (25%) by Western Temporary and twenty-five percent (25%) by Twenty First Pump. At the same time, the Administrative Law Judge took under advisement contentions by both Twenty First Pump and Western Temporary that benefits should be denied because claimant failed to make timely written claim. Respondent, Twenty First Pump, appealed from that initial Preliminary Order. Claimant argued that, since no Employer's Report of Accident had been filed, claimant had one year to make written claim. The Appeals Board reviewed the record and remanded the claim to the Administrative Law Judge for decision in the timely written claim issues. The Appeals Board noted written claim had, in each case, been made more than two-hundred (200) days but less than one year from the date of accident. The timeliness of the written claim depended on whether claimant had notified respondent of the accident. If claimant had notified the respondent and respondent did not file a Report of Accident, claimant had one year to make written claim and her written claim was timely. If on the other hand, claimant did not give notice of the accident, respondent had no obligation to file a Report of Accident and its failure to do so would not extend the time for making written claim. The claim would be barred if not made in writing within two-hundred (200) days. See Magby v. Western Temporary Services, Inc., Docket Nos. 183,397, 183,398, and 183,983 (May 1994).

On remand the Administrative Law Judge took additional evidence. From that additional evidence she found that claimant had given timely notice to Twenty First Pump.

Since Twenty First Pump did not file an Employer's Report of Accident, claimant had one year to file a written claim and her written claim was, therefore, timely. As to Western Temporary Services, the Administrative Law Judge found claimant did not give timely notice. As a result, the written claim filed more than two-hundred (200) days after the date of accident was not timely. The Administrative Law Judge then apportioned liability for the claim with fifty percent (50%) to be paid by Twenty First Pump and twenty-five percent (25%) to be paid by Lawyers Title Insurance Corporation.

On appeal Twenty First Pump argued:

- (1) The Appeals Board had already decided that Twenty First Pump was not liable and the Administrative Law Judge should not, therefore, have conducted a second hearing or heard new evidence;
- (2) The evidence does not establish accidental injury arising out of and in the course of her employment at Twenty First Pump;
- (3) Claimant failed to give timely notice to Twenty First Pump and Twenty First Pump is prejudiced by that failure;
- (4) A subsequent intervening accidental injury in the course of employment with Lawyers Title cuts off liability of Twenty First Pump Service for medical care;
- (5) The apportionment by the Administrative Law Judge contravenes the previous order by the benefit review officer apportioning liability, fifty percent (50%) to Western Temporary and fifty percent (50%) to Lawyers Title.

Twenty First Pump also asks for an order separating it from other parties for future litigation in the event claimant pursues its claim against Twenty First Pump.

Claimant lists as issues on appeal:

- (1) Whether claimant did give timely notice to Western Temporary Services;
- (2) Whether Western Temporary Services was prejudiced by lack of notice;
- (3) Whether the apportionment made by the September 8, 1994, Order was appropriate because it failed to apportion a total of one-hundred percent (100%) of the liability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds and concludes:

(1) A finding relating to whether claimant gave timely written claim is one subject to review pursuant to K.S.A. 44-534a.

(2) The Appeals Board finds, for the reasons stated below, claimant did not give timely notice to Twenty First Pump. Failure by Twenty First Pump to file an Employer's Report of Accident does not, therefore, extend the time for filing a written claim. Accordingly, claimant did not make a timely written claim for benefits from Twenty First Pump and the claim for benefits from Twenty First Pump must, therefore, be denied.

The Appeals Board finds no fault in the decision of the Administrative Law Judge to admit and consider additional evidence relating to whether claimant had given timely notice. The previous ruling of the Appeals Board in this case, dated May 26, 1994, was not intended to rule on the question of notice or timely written claim. The evidence was reviewed in that decision as a means of placing the issues in context. As indicated in that decision, the written claim against Twenty First Pump was filed more than two-hundred (200) days but less than one (1) year from date of accident. Claimant asserted that it should be allowed one (1) year because of the provisions of K.S.A. 44-557(c) which extend the time for filing a timely written claim to one (1) year in cases where the employers do not file their Report of Accident. The obligation to file a Report of Accident does not, however, apply unless the employee has given notice as provided by K.S.A. 44-520. Therefore, in order to determine whether claimant has made timely written claim against Twenty First Pump, the Appeals Board must first determine whether claimant gave notice within ten (10) days as required by K.S.A. 44-520.

After reviewing the record as a whole, the Appeals Board finds that claimant did not give timely notice to Twenty First Pump. At the first Preliminary Hearing, claimant testified that she told her supervisor, Ms. Nona Engle, that her neck and arm were hurting her. She acknowledged that she did not attribute the symptoms to her work. On the other hand, she indicated Nona Engle told her to stop lifting the pumps if that activity bothered her at work.

At the hearing on remand, claimant added testimony relating to her duties cleaning the shop and rest rooms. She testified that wringing of the washcloths and mops hurt her right arm and hand. She also testified that she told Nona Engle these duties hurt her. She further indicated that she believed she had told Nona Engle lifting the pumps hurt her arm and hand. The testimony of Nona Engle, however, directly contradicts claimant's testimony. Nona Engle testified that claimant did not tell her that wringing or squeezing the rags at work hurt her arms. Nona Engle acknowledges that claimant told her that she was having problems but insists that claimant never related them to her work. In fact, Nona Engle testifies that claimant told her she did not know the source of her problem. Nona Engle acknowledged she did tell claimant not to do anything in her work that hurt her.

From review of the evidence as a whole, the Appeals Board finds the more specific and direct evidence of Nona Engle to be more credible. The Appeals Board, therefore, finds that the claimant did not give timely notice and accordingly was required to file written

claim within two-hundred (200) days. Claimant did not make written claim against Twenty First Pump within two-hundred (200) days, and her claim for benefits to be paid by Twenty First Pump must, therefore, be denied. This finding renders moot other arguments raised by Twenty First Pump.

(3) The Appeals Board agrees with the Administrative Law Judge's finding that claimant also did not give timely notice to Western Temporary and was, therefore, required to file written claim within two-hundred (200) days. Claimant did not file written claim against Western Temporary within the two-hundred (200) days and accordingly the claims for benefits to be paid by Western Temporary should be denied.

The evidence indicates claimant was contacted by a representative of Lawyers Title and asked to apply for employment through Western Temporary. Claimant completed the paperwork at Western Temporary and was placed immediately at Lawyers Title as a temporary employee. Claimant admits that she did not report her injury to anyone at Western Temporary. She contends, however, that she cannot be bound to give notice to Western Temporary because she was not aware that Western Temporary was her employer. She assumed and considered Lawyers Title to be her employer.

The Appeals Board finds that claimant was, in fact, obligated to give notice to Western Temporary pursuant to K.S.A. 44-520. The record establishes that Western Temporary was her direct employer. Western Temporary provided her with written information advising her to report any on-the-job injury to Western Temporary. Nothing in the record indicates that Lawyers Title was an employee or an agent of Western Temporary Service for the purpose of receiving notice of accident. Claimant had previously worked as a temporary through Western Temporary. Under the circumstances the Appeals Board finds that claimant should have known of her obligation to provide notice to Western Temporary. She did not, by her own admission, give notice to Western Temporary. Accordingly, her written claim filed more than two-hundred (200) days after the last date of accident is ineffective.

(4) Twenty First Pump asks that claims against it be separated for purposes of further proceedings, if any. The present ruling is a preliminary one and does not preclude claimant from attempting to prove timely written claim for purposes of final award. However, request for severance shall be addressed to the Administrative Law Judge. The issue is not properly before the Appeals Board.

There is no dispute regarding notice to Lawyers Title. Claimant gave un rebutted testimony that she gave notice to Lawyers Title. Accordingly the Order for preliminary benefits is modified to reflect that one-hundred percent (100%) of the benefits are to be paid by Lawyers Title and/or its insurance carrier.

AWARD

WHEREFORE, the Appeals Board finds the September 8, 1994, Preliminary Order entered by Administrative Law Judge Shannon S. Krysl, requiring benefits be paid by Twenty First Pump Service, should be, and the same is hereby, reversed. Preliminary benefits ordered are to be paid solely by respondent, Lawyers Title Insurance Corporation and its insurance carrier.

IT IS SO ORDERED.

Dated this ____ day of February, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Joseph Bribiesca, Wichita, KS
Lyndon Vix, Wichita, KS
Edward Heath, Jr., Wichita, KS
Kim R. Martens, Wichita, KS
Cinda Norberg, Hutchinson, KS
Shannon S. Krysl, Administrative Law Judge
George Gomez, Director